Supreme Court, U.S.
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No. 02-_____

In The
Supreme Court of the United States

LORNA WILKES,

Petitioner,

v.

STATE OF WYOMING, WYOMING DEPARTMENT OF EMPLOYMENT, FAIR LABOR STANDARDS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

(1) Did the Tenth Circuit err in holding that for claim preclusion purposes *all* employment-related disputes between an employee and her employer constitute a single cause of action or transaction, and must therefore be litigated in the same case?

(2) Where an employee has both filed a Title VII administrative charge and brought an employment-related civil action under a different statute, is the employee obligated, in order to avoid forfeiture of the Title VII claim on claim preclusion grounds, to either (a) terminate the Title VII administrative process, or (b) seek an indefinite stay of the civil action?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lorna Wilkes respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on December 23, 2002.

OPINIONS BELOW

The December 23, 2002 opinion[1] of the court of appeals is reported at 314 F.3d 501 (10th Cir. 2002), and is reprinted in the Appendix. (1a – 10a). The April 14, 2003 order of the court of appeals denying rehearing, which is not officially reported, is reprinted at pp. 27a of the Appendix. The December 12, 2001 order of the district court, which is not officially reported, is set out at pp. 11a – 21a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 23, 2002. A timely petition for rehearing was denied on April 14, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] The opinion was amended on January 14, 2003.

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, 29 U.S.C. § 206(d)(1), provides in pertinent part:

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment and for equal work on jobs the performance of which requires equal skill, effort, and responsibility. . . .

Section 706(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this title. . . .

STATEMENT OF THE CASE

From 1990 until March 2000 petitioner Wilkes worked as a compliance officer for the respondent Wyoming Department of Employment ("DOE"), Fair Labor Standards Division. In 1999 Wilkes applied for a position as a lead compliance officer. The position was awarded instead to a probationary employee who had worked as a compliance officer for less than six months. Wilkes asserted that the probationary worker was romantically involved with Wilkes' supervisor, David Crowley, who had given the

promotion to the probationary worker because of that relationship.

Wilkes complained to the Director of the Labor Division, Charles Rando, about the decision denying her the promotion in favor of that probationary worker. Rando, Crowley and others allegedly retaliated against Wilkes for that complaint. Crowley followed Wilkes from job site to job site, making derisive and untrue remarks about her, and inaccurately completed her performance appraisal. Rando wrongly dismissed a grievance filed by Wilkes about these problems, and refused to respond to Wilkes' request for protection from the retaliatory harassment. Wilkes quit her job with the Wyoming DOE in March 2000.

On March 21, 2000, Wilkes timely filed a charge with EEOC alleging that the Wyoming DOE in violation of Title VII had retaliated against her for complaining about the disputed promotion. The retaliatory harassment, she asserted, was so severe as to constitute a constructive discharge. Under Title VII Wilkes could not have brought suit against the Wyoming DOE without first filing such a charge with the EEOC. Because the employer was a state agency, the Title VII charge was subsequently forwarded by EEOC to the Department of Justice.

On April 10, 2000 Wilkes filed a complaint in federal court in Wyoming alleging that the Wyoming DOE had violated the Equal Pay Act by paying her less than male employees who also worked as compliance officers. The Equal Pay Act, unlike Title VII, has no administrative exhaustion requirement. The substance of the Equal Pay Act and Title VII claims were unrelated. None of the allegedly higher paid male employees at issue in the Equal

Pay Act suit were involved in the promotion and retaliation dispute. The allegedly discriminatory salary levels had been established before either of those disputes arose.

The complaint in the Equal Pay Act action also asserted a claim against Rando under 42 U.S.C. § 1983. The complaint alleged, inter alia, that Rando had violated Wilkes' First Amendment rights by retaliating against her for having complained about the disputed promotion. Section 1983, however, does not authorize actions against state agencies. *Quern v. Jordan*, 440 U.S. 332 (1979). Accordingly, the April 2000 complaint asserted this section 1983 claim only against Rando, while the Equal Pay Act claim was limited to the Wyoming DOE.

In October 2000, six months after the commencement of the Equal Pay Act action, and while the Title VII charge was still pending, the defendants in the Equal Pay Act case made an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Rule 68 requires a plaintiff to respond to such an offer within ten days. On October 16, 2000, Wilkes accepted the Rule 68 offer, and judgment was entered accordingly.

Wilkes subsequently received from the Department of Justice a right to sue letter with regard to her Title VII retaliation claim. In April 2001 Wilkes filed the present action against the Wyoming DOE, alleging that that state agency had retaliated against her in violation of Title VII.

The Wyoming DOE moved to dismiss the Title VII action on the ground of claim preclusion, relying on the earlier Equal Pay Act action. The Wyoming DOE invoked Tenth Circuit cases holding that all employment-related disputes are part of a single cause of action for claim

preclusion purposes.[2] The district court dismissed the Title VII action on claim preclusion grounds. (20a).

The court of appeals affirmed. The panel noted that it was bound by Tenth Circuit precedent, under which "all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." (6a, *quoting Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir. 2000)). Thus the earlier Equal Pay Act action against the Wyoming DOE precluded the later Title VII action, regardless of whether the facts of the salary dispute were unrelated to the factual issues regarding the alleged retaliation.

The panel also rejected Wilkes' argument that it would have been impracticable for her to include the Title VII claim in the Equal Pay Act lawsuit. The panel acknowledged that Wilkes could not have brought the Title VII action without first filing a charge with EEOC and receiving a right-to-sue letter. In the instant case the right-to-sue letter was not issued by the Department of

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[2] Memorandum of Law in Support of Defendant's Motion for Judgment on the Pleadings, pp. 10-11.

In both the district court and the court of appeals, the Wyoming DOE also argued that the assertion of the retaliation claim against *Rando* in the first suit barred the assertion in the second suit of a retaliation claim against the DOE. (*Id.* pp. 6-10; Appellee's Brief, No. 02-8003, pp. 22-25). Counsel for respondent conceded, however, that Rando and the Wyoming DOE were not in privity. ("I will concede if you sue a state official in his individual capacity, the case law appears to say that there's no privity between the state official in his individual capacity and the state with respect to some of these civil rights laws. I don't agree with that, but that appears to be the law.") (Transcript of Hearing on Defendant's Motion for Judgment on the Pleadings, Oct. 18, 2001, p. 35). Neither lower court addressed this argument.

Justice until several months after the acceptance of the Rule 68 offer had ended the Equal Pay Act lawsuit. The panel held that in such circumstances a Title VII complaining party was obligated either (1) to seek a stay of her pending non-Title VII action or (2) to demand, 180 days after the filing of the Title VII charge, that the EEOC (or Department of Justice) terminate its investigation and conciliation of the charge, and issue a right-to-sue letter. (8a-9a).

The court of appeals denied a timely petition for rehearing. (22a).

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S RULE THAT ALL EMPLOYMENT-RELATED DISPUTES CONSTITUTE A SINGLE TRANSACTION OR CAUSE OF ACTION CONFLICTS WITH THE CLAIM PRECLUSION STANDARDS IN NINE OTHER CIRCUITS

This case concerns a well-established Tenth Circuit rule – rejected by numerous other circuits – that *all* employment-related disputes constitute a single cause of action for claim preclusion purposes.

Claim preclusion can bar assertion in a later action of a claim that was not actually litigated against the defendant in the earlier lawsuit. But claim preclusion of non-litigated issues is necessarily limited to subsequently raised claims so connected to the earlier litigated claim that they constitute "the same cause of action." *Nevada v. United States*, 463 U.S. 110, 130 (1983). Claims arising out of a single "transaction" are commonly regarded as involving

the same cause of action; most circuits understand "transaction" in its ordinary sense, referring to a discrete event.

In the Tenth Circuit, however, all the quite dissimilar and entirely unrelated events that may occur over the course of an individual's employment are labeled a single "transaction" for claim preclusion purposes. The Tenth Circuit, unlike almost every other circuit in the nation, holds that *all* disputes between an employee (or former employee) and her employer constitute a single cause of action, and thus must be litigated together. The Tenth Circuit rule expressly applies regardless of whether the events underlying the two claims are in fact entirely "unrelated." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1228 (10th Cir. 1999). In the Tenth Circuit there avowedly is no requirement that the two employment-related disputes have anything in common – they need not have the same core of operative facts, involve the same events, require resolution of related factual disputes or rest on the testimony of the same witnesses. As counsel for respondent correctly stated in the proceedings below, in the Tenth Circuit, "if you've got any claims against your employer, regardless of whether there's factual overlap between those employment-related claims, you gotta bring them all in the same lawsuit."[3]

[3] Transcript of Hearing on Defendant's Motion for Judgment on the Pleadings, p. 6.

A. This Case Exemplifies the Tenth Circuit Rule That All Employment-Related Claims Are Deemed Part of A Single Cause of Action

The leading Tenth Circuit decision is *Clark v. Haas Group, Inc.*, 953 F.3d 1235 (10th Cir. 1992). Clark's first lawsuit was for unpaid overtime compensation under the Fair Labor Standards Act. Her second lawsuit alleged salary discrimination violating the Equal Pay Act and a violation of the Age Discrimination in Employment Act. The court of appeals found that the later discrimination claims were barred by the earlier FLSA suit. The appellate court did not dispute that "the facts needed to prove a charge of discrimination are very different in motivation and origin from the facts needed to prove the overtime compensation charge." 953 F.2d at 1237. It held, however, that the overtime dispute and the discrimination claims constituted a "single cause of action" solely because they both involved employment.

> [T]he "transaction" was Clark's employment with HGI. . . . There was a single "transaction" in that the "claims" in each case were predicated on Clark's employment. . . .

953 F.2d at 1239.

In *Yapp v. Excel Corp.*, 186 F.3d 1222 (10th Cir. 1999), the plaintiff's initial action had been brought under the Fair Labor Standards Act to recover overtime pay; his subsequent action raised a variety of unrelated claims, including wrongful discharge. The court of appeals concluded that Tenth Circuit precedent meant that the wrongful discharge claim was precluded by the earlier FLSA suit, even though there was no factual connection

between the two claims. The earlier decision in *Clark v. Haas Group, Inc.*, *Yapp* explained, had determined that

> [Clark's] second claim was precluded by the first since both were based upon a single transaction: the employment relationship. . . . The court in *Clark* eliminated all ambiguity in the meaning of "transaction" in this factual context; it stated that "the 'transaction' was Clark's employment." . . . [O]ne panel cannot overrule another. . . . [C]onsequently we are not free to transactionally distinguish wrongful termination claims from those arising out of the employment but before and *unrelated to the discharge*.

186 F.2d at 1228 (Emphasis added).

In *Mitchell v. City of Moore, Okl.*, 218 F.3d 1190, 1202 (10th Cir. 2000), the court of appeals reiterated that "all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." In that case (as in the instant case) the first lawsuit concerned actions that had occurred while Mitchell was still an employee (there including defamation and invasion of privacy), and the second proceeding concerned the plaintiff's subsequent dismissal. 218 F.3d at 1196-97. The Tenth Circuit also applied the rule in *Clark* in *King v. Union Oil Co. of California*, 117 F.3d 443 (10th Cir. 1997), holding that a previous action asserting discrimination on the basis of race and disability barred a subsequent suit alleging that the plaintiff had been denied severance benefits in violation of ERISA. 117 F.3d at 446 (*quoting Clark*).

In the instant case the court of appeals again applied this well-established Tenth Circuit rule. The panel did not suggest that there was any factual or evidentiary

connection between Wilkes' earlier salary discrimination under the Equal Pay Act and her later retaliatory constructive discharge claim under Title VII. The retaliation related solely to a promotion dispute; Wilkes did not even raise the salary disparity problem until after she had left her job. But under Tenth Circuit precedent that lack of relationship was simply irrelevant.

> This court repeatedly has held that "all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." *Mitchell v. City of Moore*. . . . As in *Clark* and *Yapp*, Wilkes' first and second lawsuits arose from the same transaction – her employment relationship with the Wyoming DOE. "Consequently, we are not free to transactionally distinguish wrongful termination claims from those arising out of the employment but *before and unrelated to* the discharge." *Yapp*, 186 F.3d at 1228.

(6a – 7a) (Emphasis added).

B. This Tenth Circuit Claim Preclusion Rule Conflicts With Decisions in Numerous Other Circuits

The Tenth Circuit has frankly recognized that its per se rule regarding employment claims is at odds with the standards applied in other circuits. In *Yapp* the Tenth Circuit acknowledged that

> [t]he transactional test has been rearticulated by courts in a variety of ways, most of which focus upon whether the two suits are both based upon a discrete and unitary factual occurrence. . . . *No*

> *other court applying the transactional test has held that suits arising from the same employment relationship are thereby necessarily grounded upon the same transaction.* This panel, however, cannot overrule *Clark*. . . . Some courts have addressed cases in which multiple suits arose from the same employment relationship and have concluded that the second suit was *not* precluded by the first because it was grounded upon a different transaction *See, e.g., Doe v. Allied Signal, Inc.*, 985 F.2d 908, 914-15 (7th Cir. 1993).

186 F.3d at 1228 (footnote omitted) and n.6 (emphasis added). In commenting on the uniqueness of the Tenth Circuit standard, *Yapp* noted that other circuits had applied claim preclusion to employment claims only where there was a specific factual connection between the claims involved.[4]

In the court of appeals below Wilkes expressly argued that under the standard applied in other circuits claim preclusion would not bar her Title VII action.[5] The panel candidly acknowledged that the Tenth Circuit standard differed from that in the Seventh Circuit.

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[4] [C]ourts have precluded second suits brought by former employees because both suits were predicated upon *the same discrete event*, such as the employee's wrongful discharge, rather than the entirety of the employment relationship. *See, e.g., Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1166 [(1st Cir. 1991)] (holding that claim preclusion applied because both suits stemmed from plaintiff's termination); *Langston v. Insurance Co. of N. Am.*, 827 F.2d 1044, 1047 (5th Cir. 1987) (same).

186 F.3d at 1228 n.6.

[5] Brief of Plaintiff/Appellant, No. 02-8003 (10th Cir.), pp. 26, 28; Reply Brief of Plaintiff/Appellant, No. 02-8003 (10th Cir.), pp. 3-4.

> Wilkes' reliance on *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.3d 223 (7th Cir. 1993), is misplaced. In *Herrmann* . . . the Seventh Circuit concluded that under the transactional test, "two claims are one . . . if they are based on the same, or nearly the same, factual allegations." *Id.* at 226. . . . Although the standard set forth in *Herrmann* would require more similarity in the specific factual basis underlying each claim before claim preclusion would apply, *this court has adopted a broader definition* of "transaction."

(7a – 8a) (Emphasis added).

Every other circuit to address this issue has held that in employment cases, as in all other cases, claim preclusion can be invoked only on a case-specific demonstration that the specific events which gave rise to the first action are substantially related to the particular events that are the basis of the second.

The Seventh Circuit has repeatedly permitted plaintiffs to maintain successive but unrelated employment actions. *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir. 1993), held that an earlier Title VII action challenging the plaintiff's dismissal did not preclude a later action regarding a denial of benefits alleged to violate ERISA. Judge Posner explained that under Seventh Circuit precedent

> two claims are one for purposes of res judicata if they are based on the same, or nearly the same, factual allegations. . . .
>
> In the present case . . . only one fact on which the two claims are based is the same – that the plaintiff was terminated. The other facts on which the Title VII claim is based concern the

> conduct of the defendant leading up to the plaintiff's discharge, while the other facts on which the COBRA claim is based concern the processing of her request for continued benefits after she was discharged. No one suggests that these different-seeming factual packets are at root the same. . . . It is like the typical retaliation case, in which an employee files a claim based on some set of facts and then the employer fires him for filing the claim, precipitating a second claim. They are two claims, not one, for purposes of res judicata.

999 F.2d at 226-27.

In *Doe v. Allied Signal, Inc.*, 985 F.2d 908 (7th Cir. 1993), the Seventh Circuit held that an employee's action for fraud and breach of contract was not barred by an earlier action alleging that the employer's negligence had led to the rape of the plaintiff. These two employment-related actions did not involve the same cause of action because under the Seventh Circuit's "same transaction test, a cause of action consists of a 'single core of operative facts' giving rise to a remedy." 985 F.2d at 913. "[T]he facts . . . which formed the basis of the negligence claim . . . are irrelevant to the instant case. . . . Allied's alleged breach of contract and defrauding of Doe [had] almost nothing to do with negligence leading to a rape." *Id.* In *Andersen v. Chrylser Corp.*, 99 F.3d 846 (7th Cir. 1996), the plaintiffs brought successive suits under ERISA against their employer. The court of appeals found that claim preclusion was inapplicable, because the two lawsuits involved different benefit plans, different plan officials, and different disputed plan actions. 99 F.3d at 854. Thus the two claims, although arising under the same statute, were not

"based on the same, or nearly the same, factual allegations." 99 F.3d at 852.

In the Second Circuit

> [i]t is the identity of facts surrounding the occurrence which constitutes the cause of action . . . "[W]hen the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of *res judicata*."

Woods v. Dunlop Tire Corp., 972 F.2d 36, 39 (2d Cir. 1992) (*quoting Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977)). The Second Circuit has repeatedly held that res judicata does not bar separate, successive employment-related lawsuits if the underlying factual issues are distinct. In *NLRB v. United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983), the court of appeals held that successive lawsuits involving the same collective bargaining provision and the same employer rule were permitted; the controlling test was "whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." 706 F.2d at 1260. Similarly, prior litigation of a claim for an unpaid salary does not bar a subsequent ERISA claim. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir. 2002) (describing *Yoon v. Fordham Univ. Faculty & Admin. Retirement Plan*, 263 F.3d 196 (2d Cir. 2001)). An earlier action alleging breach of an oral agreement does not bar a later contract action to obtain pension benefits. *Herendeen v. Champion Intern.*

Corp., 525 F.2d 130 (2d Cir. 1975).[6] A prior harassment action does not bar a subsequent dispute alleging retaliatory dismissal, since the two actions do not derive from "the same 'nucleus of operative act' or involv[e] the same factual predicate." *Williams v. Perry*, 229 F.3d 1136, 2000 WL 1506086 *3 (2d Cir. 2000). The Second Circuit has applied claim preclusion in employment cases only where and because the factual disputes underlying the two actions were the same.[7]

The Third Circuit limits claim preclusion to instances in which there is an "essential similarity of the underlying events giving rise to the various legal claims." *Davis v. United States Steel Supply*, 688 F.2d 166, 171 (3d Cir. 1982) (en banc). The controlling questions are

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[6] *Herendeen* held that under both federal and state law the relevant criteria were "whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in the first, and whether the essential facts and issues in the second were present in the first." 525 F.2d at 133-34 (footnotes omitted). "[I]t seems obvious that evidence which would have tended to support or to deny the allegation in the [first] complaint would not be required to meet the issues presented in the [second] complaint." 525 F.2d at 135.

[7] *E.g.*, *Woods v. Potter*, 2003 WL 21182200 (2d Cir.) (claim preclusion applied because both suits involved the plaintiff's "termination and the circumstances surrounding it"); *Cieskowska v. Gray Line New York*, 295 F.3d 204, 206 (2d Cir. 2002) ("the factual predicates of plaintiff's allegations in the first and second complaints involve the same events concerning her employment, pay history, and termination."); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 638 (2d Cir. 1989) (employee's two actions "arose from a 'single core of operative facts.' ").

> whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same.

Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991) (*quoting United States v. Athlone Industries, Inc.*, 746 F.2d 977, 984 (3d Cir. 1984)). Claim preclusion applies to successive employment-related lawsuits only on a showing that they "'involve[d] the same cause of action because the underlying events in both cases are the same,' as the acts complained of were the same, and the evidence at the trial would have been the same." *Churchill v. Star Enterprises*, 183 F.3d 184, 195 (3d Cir. 1999).

The Fourth Circuit applies claim preclusion to cases involving "the same core of operative facts,"[8] and utilizes that standard in employment cases.[9] The Fifth Circuit standard is whether the lawsuits in question arose out of "the same nucleus of operative facts";[10] claim preclusion

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[8] *Grausz v. Englander*, 321 F.3d 467, 473 (4th Cir. 2003); *The Pittston Co. v. United States*, 199 F.3d 684, 704 (4th Cir. 1999) ("The term 'transaction' in the claim preclusion context 'connotes a natural grouping or common nucleus of operative facts.'"); *Harms v. United States*, 972 F.2d 339, 1992 WL 203942 *7 (4th Cir.).

[9] *United States ex rel. Consumer Health Foundation*, 28 Fed. Appx. 178, 2001 WL 1397852 *6 (4th Cir. 2001) (claim preclusion bars later action alleging retaliatory dismissal where same dismissal had earlier been challenged in an action under the Age Discrimination in Employment Act); *Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir. 1990) ("It is quite clear . . . that facts surrounding [the making and creation of certain notes] were critical to Keith's . . . claim in the first suit and to the . . . claim in the second suit.").

[10] *Agrilectric Power Partners, Ltd. v. General Electric Co.*, 20 F.3d 663, 665 (5th Cir. 1994); *Eubanks v. Federal Deposit Insurance Corp.*,

(Continued on following page)

has been applied to successive employment suits if they meet that standard.[11] The Eighth and Eleventh Circuits also utilize a "common nucleus of operative facts" standard for both employment and non-employment cases.[12] In the Sixth Circuit as well claim preclusion bars an employment action if it rests on the "same operative facts" as an earlier lawsuit between the same parties.[13] *See Viciedo v. New Horizons Computer Learning Center*, 246 F.Supp. 886, 907 (S.D. Ohio 2003) (refusing to follow the Tenth Circuit

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977 F.2d 166, 171 (5th Cir. 1992); *Howe v. Vaughan*, 913 F.3d 1138, 1144 (5th Cir. 1990); *In re Air Crash At Dallas/Fort Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1989).

[11] *Slaughter v. A T & T Information Systems, Inc.*, 905 F.2d 92 (5th Cir. 1990) (successive suits regarding denial of severance benefits); *Langston v. Insurance Co. of North America*, 827 F.2d 1044 (5th Cir. 1987) (successive suits regarding dismissal of plaintiff); *Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829 (5th Cir. 1983) (successive suits regarding dismissal of plaintiff); *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556 (5th Cir. 1983) (successive suits regarding a single refusal to hire plaintiff).

[12] *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir. 2003) (employment case); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1298-99 (11th Cir. 2001); *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 n.8, 1240 (11th Cir. 1999); *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 (11th Cir. 1998) (employment case); *Israel Discount Bank, Ltd. v. Entin*, 951 F.2d 311, 315 (11th Cir. 1992) (employment case); *Murphy v. Jones*, 877 F.2d 682, 684-85 (8th Cir. 1989); *Hufsmith v. Weaver*, 817 F.2d 455, 461 (8th Cir. 1987); *Poe v. John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir. 1982) ("the term 'transaction' connotes a common nucleus of operative facts.") (employment case).

[13] *Rivers v. Barberton Bd. of Education*, 143 F.3d 1029, 1030 (6th Cir. 1998); *Sherman v. Ludington*, 968 F.2d 1216, 1992 WL 158878 *6 (6th Cir.); *see Westwood Chemical Co., Inc. v. Kulik*, 656 F.2d 1224, 1227 (6th Cir. 1981) ("To constitute a bar, there must be an identity of the causes of action that is, an identity of the facts creating the right of action and of the evidence necessary to sustain each action.").

decision in *Clark* because "no equivalent rule exists within the Sixth Circuit.").

The Ninth Circuit applies to claim preclusion questions in employment cases the same four-part standard it utilizes for all other[14] claim preclusion disputes:

> (1) whether the rights or interests established in the prior litigation would be impaired by th[e second] action, (2) if the same evidence would be presented, (3) if the same right is infringed, and (4) if the suit arises from the same transactional nucleus.

Williams v. McDonnell Douglas Helicopter Co., 1990 WL 66550 *2 (9th Cir.) (second lawsuit seeking withheld benefits barred by claim preclusion).[15]

C. This Conflict And Uncertainty Regarding the Scope of Claim Preclusion Raises Important Problems Which This Court Should Resolve

This inter-circuit conflict is of great practical importance. Disagreement and uncertainty regarding the scope of claim preclusion imposes a substantial and unfair burden on parties and on their attorneys, both of whom

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[14] *E.g.*, *Rein v. Providian Financial Corp.*, 252 F.3d 1095, 1100 (9th Cir. 2001) (four-part standard); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992) (same); *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (same).

[15] *See Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998) (claim preclusion applied to second Title VII action which was based on "precisely the same incidents . . . as [plaintiff] now cites in support of his hostile work environment claim.").

need a predictable legal standard. As Judge Posner correctly observed,

> Litigants and their lawyers are entitled to clearer guidance in the forfeiture of valuable legal rights. . . . When certainty is at a premium, sound lawmaking requires the setting forth of clear and definite criteria rather than a general directive to decide each case in the manner that will maximize the attainments of the law's objectives.

Herrmann v. Cencom Cable Associates, Inc., 999 F.2d 223, 226 (7th Cir. 1993).

> Res judicata was not meant to be a trap for the unwary and members of the bar ought to be able to advise their clients as to its applicability.

Andersen v. Chrysler Corp., 99 F.3d 846, 852 (7th Cir. 1996).

The Seventh Circuit in *Herrmann* and *Andersen* wisely acted to provide the needed clarity by confining claim preclusion to cases that are based on "the same, or nearly the same, factual allegations." *Herrmann*, 999 F.2d at 226; *Andersen*, 99 F.3d at 852. The Tenth Circuit claim preclusion standard could not be more different; it does not require any significant similarity in the actual issues in the two cases. Ambiguous standards may deny litigants and lawyers the needed predictable guidance; conflicting standards do so a fortiori.

In the area of employment litigation, uncertainty about the scope of claim preclusion carries with it an additional cost. This problem arises most often in employment litigation because employees with Title VII charges pending before the EEOC are compelled to

commence actions under other statutes to avoid the running of the statutes of limitations. As we explain below, a number of courts have held that *if* the Title VII and other claims are part of the same cause of action, the employee can only avoid preclusion of the Title VII claim by either pretermitting the EEOC administrative process, thus preventing the agency from investigating and possibly conciliating the Title VII claim, or asking for a potentially indefinite delay in the non-Title VII litigation. If that rule is correct, then uncertainty about the scope of claim preclusion in employment cases is all the more serious, because it will force cautious litigants and their attorneys either to unnecessarily interfere with the EEOC or to needlessly delay the progress of non-Title VII litigation.

The particular form of the Tenth Circuit rule has even broader implications. That circuit insists that all disputes arising out of an employment relationship are part of a single "transaction." The legal standard concerning what is a single transaction governs not only claim preclusion, but also the scope of compulsory counterclaims, and thus the scope of federal supplemental jurisdiction. Fed. R. Civ. Pro. 13(a). The scope of a "transaction" also affects third party claims, Fed. R. Civ. Pro. 14(a), and permissive joinder. Fed. R. Civ. Pro. 20(a). Whenever the United States brings a civil action, it is deemed to have waived sovereign immunity with regard to any counterclaim that arises from the same "transaction" as the government's own claim. 11 U.S.C. § 106(a).

Review by this Court is particularly appropriate because delineation of the principles of res judicata, collateral estoppel and claim preclusion has for two centuries been virtually the exclusive province of the federal judiciary. Within the federal system (as in at least most

states), the scope of these doctrines has evolved considerably over the decades, but those changes have been the handiwork of this Court and the lower courts. Where, as here, the lower courts are divided about an important and recurring issue of claim preclusion, there is essentially no possibility that Congress will intervene to address the problem.

The Tenth Circuit decision represents a dramatic departure from the scope of claim preclusion previously recognized by this Court's decisions. In *Hurn v. Oursler*, 289 U.S. 238 (1933), the Court held that claim preclusion was appropriate where the two actions so "rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." 289 U.S. at 246. The facts of two suits involve the same cause of action if they demonstrate "the violation of but one right by a single legal wrong." *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 321 (1927). Since the days of *Hurn* and *Phillips*, the lower courts have evolved a variety of more expansive views of what constitutes a single cause of action. *Nevada v. United States*, 463 U.S. 110, 131 (1983). This case demonstrates the compelling need for this Court to resolve differences among the lower courts about this vital area of court-made law.

II. THE TENTH CIRCUIT'S REQUIREMENT THAT TITLE VII CHARGING PARTIES EITHER TERMINATE THE TITLE VII ADMINISTRATIVE PROCESS, OR STAY ANY PENDING RELATED LITIGATION, CONFLICTS WITH THE DECISIONS OF THIS COURT

This case presents a recurring issue of central importance to the enforcement of federal employment statutes.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), this Court emphasized that the various remedies provided by federal employment laws were to be "truly independent" of one another. 421 U.S. at 466. The decision below interconnects those supposedly distinct remedies in a complex and potentially destructive manner.

The linchpin of the Title VII enforcement process is the investigative and conciliation function of the EEOC. Before an aggrieved employee can bring suit under Title VII, he or she must first file a discrimination charge with the EEOC. The Commission investigates the charge; where it concludes there is cause to believe that discrimination occurred, the Commission seeks to negotiate a conciliation agreement between the parties. The charging party cannot file suit until he or she has received a right-to-sue letter, which ordinarily is issued when the administrative process has ended. The charging party need not wait indefinitely for the process to end; once 180 days have passed since the filing of the charge, the aggrieved employee can ask for and obtain such a right-to-sue letter. Most charging parties, however, opt to await the completion of that process, rather than demanding such a premature right-to-sue letter. The EEOC administrative process typically lasts more than 180 days; this Court has noted that there have been "significant delays" in the EEOC administrative proceedings. *Johnson v. Railway Express Agency*, 421 U.S. at 466 n.11 (1975).[16] A similar administrative process must precede employment suits

[16] *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 369 (1977).

under the Americans With Disabilities Act[17] and the Age Discrimination in Employment Act.[18]

A Title VII charging party may also have important claims under other federal employment laws, such as the Equal Pay Act, the Fair Labor Standards Act, or ERISA. The statutes of limitations applicable to those laws commence with the relevant violation, and are *not* tolled by the pendency of a related Title VII charge. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Thus a Title VII charging party cannot simply wait until the completion of the Title VII administrative process before bringing suit under other federal statutes. Once commenced, a suit under such other statutes may well be resolved before the completion of the Title VII administrative process, especially if the non-Title VII lawsuit is decided quickly or if the administrative process is prolonged. In the instant case, for example, the non-Title VII lawsuit was resolved only six months after it was begun.

The court below held that in such circumstances claim preclusion will bar a subsequent Title VII action even though the first, non-Title VII action ended before the EEOC had either completed its investigation and conciliation efforts or issued a right-to-sue letter. The Tenth Circuit insisted that in such a not uncommon situation the plaintiff, in order to preserve his or her Title VII claim, must either (1) demand a right-to-sue letter without

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[17] The Title VII enforcement process governs claims under Title I of the Americans With Disabilities Act. 42 U.S.C. § 12117(a).

[18] 29 U.S.C. § 626(d). A charging party can sue following the passage of 60 days from the date on which the charge was filed.

permitting the EEOC to complete its administrative work, or (2) ask for a judicial stay of the non-Title VII claim until the EEOC's efforts have ended. (10a). Several circuits have adopted some version of these requirements. (8a).

The first alternative requirement imposed by the Tenth Circuit is inconsistent with this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson* this Court insisted that federal laws should be construed in a manner that would not "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims." 491 U.S. at 180. *Patterson* refused to interpret 42 U.S.C. § 1981 in a manner which would leave plaintiffs "free" to disregard "the detailed procedures of Title VII." 491 U.S. at 181. The decision of the Tenth Circuit effectively *compels* Title VII charging parties to do just that. The decision below does not merely permit an employee "to circumvent the detailed remedial scheme constructed in [Title VII]," 491 U.S. at 181, it often requires such circumvention.

The EEOC has forcefully explained that the Tenth Circuit's first requirement obstructs the basic Title VII enforcement scheme.

> Title VII and its legislative history reflects a strong preference for letting the administrative process run its course so that as many charges as possible could be resolved by informal methods of conciliation and persuasion. Application of a preclusion rule which would have the effect of forcing many individuals aggrieved by employment discrimination to forego the full administrative process of investigation, determination, and conciliation by prematurely requesting notices of

> right to sue would be inconsistent with this Congressional purpose. . . .
>
> In addition to eliminating the possibility of informal resolution of the charge, a rule which coerces aggrieved individuals into prematurely requesting notices of right to sue will deprive them of other benefits of the administrative process. Since the Commission normally closes investigations when the charging party requests a right to sue notice, the individual may never learn information the Commission might have uncovered had its investigation continued. . . . The plaintiff will also lose the potential evidentiary value of a Commission finding of reasonable cause; for that matter, a defendant will lose the evidentiary value of a finding of no-cause. . . .
>
> [If a plaintiff] request[s] a notice of right to sue, she would [lose] the chance that the Commission might file suit on her behalf. This would harm not only the charging party's private interest, but also interfere with the Commission carrying out its mission of enforcing Title VII.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae, Woods v. Dunlop Tire Corp., No. 92-7198 (2d Cir.), pp. 10-12.

The alternative offered by the Tenth Circuit, forcing the plaintiff to seek a potentially indefinite stay of his or her non-Title VII claim, is one which this Court warned in *Patterson* would often not be a "satisfactory" solution. 421 U.S. at 465. Practical experience in this area demonstrates the burdensomeness of this requirement. Most plaintiffs to

whom this requirement has been applied have been fired or forced to resign.[19] A stay postpones, possibly for years, the day on which a plaintiff may be able to win reinstatement on the non-Title VII ground. Imposing such delays on claimants, on pain of forfeiture of their Title VII claims, is inconsistent with this Court's insistence that what employee-plaintiffs need, and what federal law should be construed to assure, is "jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982). Even where only monetary relief is involved in the first lawsuit, an out-of-work plaintiff can ill afford delay in the payment of unlawfully denied wages.

The circumstances of this case illustrate the manner in which the Tenth Circuit rule can inexorably eviscerate a plaintiff's Title VII claim. The 180 mandatory exhaustion period in this case lasted until September 17, 2000; the deadline for responding to the Wyoming DOE's offer of judgment was October 22, 2000. It would have been quite impossible during the intervening 35 days for Wilkes to obtain a right-to-sue letter and then amend the complaint in her Equal Pay Act action.[20] Conversely, although it is possible to stay judicial proceedings, there is no provision

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[19] *E.g.*, *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 711 (9th Cir. 2001) (plaintiff had been dismissed); *Churchill v. Star Enterprises*, 183 F.3d 184, 187 (3rd Cir. 1999) (same); *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223, 224 (7th Cir. 1993) (same); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 37 (2d Cir. 1992) (same).

[20] In practice, at least where the EEOC has referred a charge to the Department of Justice, several weeks to several months may pass before a right-to-sue letter is issued. Upon receipt of such a letter, a plaintiff would have to file a motion to amend her complaint, with additional weeks required for briefing and then action by the court.

in the Federal Rules for staying the period for responding to a Rule 68 offer of judgment. Thus once the offer of judgment was made, there was no way to use a stay to maintain the status quo until a right-to-sue letter was obtained.

In some cases, as here, the Tenth Circuit rule has the effect of penalizing litigants who act with dispatch, while rewarding those who sleep (or at least nap on) their rights. Wilkes was forced to resign on March 1, 2000; because Title VII affords employees 300 days within which to file a Title VII charge, Wilkes could have waited until late December, 2000, before she filed her Title VII charge. Had she simply postponed filing her charge until after October 2000, the Tenth Circuit rule would have been entirely inapplicable. Had she merely waited until May 2000 to do so, the 180 mandatory Title VII exhaustion period would not yet have expired before the Equal Pay Act claim was resolved. *Johnson v. Railway Express Agency* insisted that federal employment laws should not be construed to relieve a plaintiff who "has slept on his . . . rights." 421 U.S. at 466. The holding of the Tenth Circuit rule does not merely relieve such behavior; the decision below affirmatively encourages it.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LORNA WILKES, Plaintiff-Appellant, v. WYOMING DEPARTMENT OF EMPLOYMENT DIVISION OF LABOR STANDARDS, Defendant-Appellee.	No. 02-8003
UNITED STATES OF AMERICA, Intervenor.	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

(D.C. No. 01-CV-1020-D)

(Filed Dec. 23, 2002)

John I. Henley, Vlastos, Henley & Drell, P.C., Casper, Wyoming, for the plaintiff-appellant. Jay A. Jerde, Senior Assistant Attorney General (Hoke Macmillan, Attorney General, and John W. Renneisen, Deputy Attorney General, with him on the brief), Cheyenne, Wyoming, for the defendant-appellee.

Sarah E. Harrington and Ralph F. Boyd, Jr., U.S. Department of Justice, Washington, D.C., for the intervenor.

Before **BRISCOE**, **HOLLOWAY**, and **HARTZ**, Circuit Judges.

BRISCOE, Circuit Judge.

Lorna Wilkes appeals the district court's grant of summary judgment in favor of the Wyoming Department of Employment (Wyoming DOE). The district court concluded Wilkes' suit against the Wyoming DOE alleging violations of Title VII, 42 U.S.C. § 2000e-2, and the Wyoming Fair Employment Practice Act, Wyo. Stat. Ann. § 27-9-105, was barred by claim preclusion. We affirm.

I.

Wilkes worked as a compliance officer for the Wyoming DOE, Fair Labor Standards Division, from 1990 until March 2000 when she was allegedly constructively discharged. Wilkes applied for a position as lead compliance officer in 1999, but the position was awarded to an employee who had worked as a compliance officer for less than six months, i.e., a probationary employee. According to Wilkes, the employee was awarded the position because she was romantically involved with Wilkes' immediate supervisor, who was on the interview committee and was involved in the hiring decision. Wilkes alleges that when she complained to Charles Rando, acting director of the labor division, he confronted Wilkes' supervisor. Wilkes' supervisor retaliated by following her from job site to job site, making derisive and untrue remarks about and to Wilkes, and inaccurately completing her performance appraisal and placing her on a "work-plan." Wilkes quit her job with the Wyoming DOE in March 2000.

On March 21, 2000, Wilkes timely filed a charge with the EEOC against the Wyoming DOE for retaliating against her in violation of Title VII. On April 10, 2000, Wilkes filed a complaint in federal court against the Wyoming DOE and Rando in his individual capacity. She alleged that the Wyoming DOE paid her less than her male coworkers for the same position, skill, effort, and responsibility, in violation of the Equal Pay Act of the Fair Labor Standards Act, 29 U.S.C. § 206(d). Her claim against Rando was filed pursuant to 42 U.S.C. § 1983 and arose out of the hiring of the probationary employee instead of Wilkes for the position of lead compliance officer. Wilkes further alleged retaliation in violation of her free speech rights and deprivation of her property and liberty interests without due process of law.

On October 12, 2000, the defendants made an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Wilkes accepted the Rule 68 offer on October 16, 2002, and judgment was entered against defendants on October 31, 2000. A satisfaction of judgment was filed by Wilkes on November 9, 2000.

The EEOC issued Wilkes a right-to-sue letter on February 8, 2001. In April 2001, she filed the present action against the Wyoming DOE, alleging violations of Title VII and the Wyoming Fair Employment Practice Act. In June 2001, the Wyoming DOE moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing Wilkes' second action was barred by claim preclusion. Because the district court considered matters outside of the pleadings, it converted the motion to one for summary judgment and granted

summary judgment in favor of Wyoming DOE on the basis of claim preclusion.

II.

Wilkes contends the district court erred in granting summary judgment in favor of the Wyoming DOE on the basis of claim preclusion. Specially, she argues that since she had not yet received a right-to-sue letter from the EEOC, she was statutorily prohibited from raising her Title VII claims in her first lawsuit and, therefore, should not be barred from raising those claims in a subsequent lawsuit.

"In reviewing a grant or denial of summary judgment, we apply the same standard applied by the district court under Federal Rule of Civil Procedure 56(c)." *King v. Union Oil Co.*, 117 F.3d 443, 444-45 (10th Cir. 1997). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Whether the doctrine of res judicata applies to the case before us is a question of law which we review under the de novo standard." *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1467-68 (10th Cir. 1993) (internal citations omitted); *see King*, 117 F.3d at 445 (stating "[w]here the facts are not in dispute, this court must determine de novo whether the substantive law of res judicata was correctly applied" (internal quotation omitted)).

"Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action."[1] *Satsky*, 7 F.3d at 1467 (internal quotations omitted; emphasis added). "To apply the doctrine of res judicata, three elements must exist: (1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *King*, 117 F.3d at 445.

Here, neither party contests the district court's conclusion that the Rule 68 judgment entered in Wilkes' first lawsuit was a final judgment. Moreover, there is an identity of parties – Wilkes and the Wyoming DOE were parties in both suits. Under such circumstances, claim preclusion bars Wilkes' instant suit if it is based on the same cause of action as her first suit.

In *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335 (10th Cir. 1988), this court adopted the transactional approach of Restatement (Second) of Judgments to determine what constitutes a "cause of action" for claim preclusion purposes. The transactional approach provides that a final judgment extinguishes:

> all rights of the plaintiff to remedies against the defendant with respect to all or any part of

[1] For purposes of clarity this court employs the terms "claim preclusion" instead of "res judicata." *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 76 n.1 (1984); *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n.1 (10th Cir. 1999).

> the transaction, or series of connected transactions, out of which the action arose. . . . What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit. *Id.* at 1335 (quoting Restatement (Second) of Judgments § 24); *see also King*, 117 F.3d at 445.

"Under [the transactional] approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." *Nwosun v. General Mills Rest., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997).

This court repeatedly has held that "all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." *Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir. 2000). *See Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1239 (10th Cir. 1992) (holding plaintiff's second suit was barred by claim preclusion because "the 'claims' in each case were predicated on [plaintiff's] employment"); *Yapp*, 186 F.3d at 1228 (stating "[t]he court in *Clark* eliminated all ambiguity in the meaning of "transaction" in this factual context: it stated that "the 'transaction' was Clark's employment" (internal quotations omitted)). In *Clark* and *Yapp*, the plaintiffs brought actions against their former employers under the Fair Labor Standards Act, 29 U.S.C. § 216(b), for unpaid overtime compensation, and later brought

second actions against their former employers for wrongful discharge. On appeal, this court held that plaintiffs' second suits were precluded since they were based upon the same transactions, i.e., the employment relationships.

The relevant facts in this case are substantially similar to those in *Clark* and *Yapp*. Wilkes filed suit against her former employer for equal pay under section 206(d) of the Fair Labor Standards Act and later filed suit against her former employer for wrongful discharge, i.e., constructive discharge based on gender discrimination and retaliation. As in *Clark* and *Yapp*, Wilkes' first and second lawsuits arose from the same transaction – her employment relationship with the Wyoming DOE. "Consequently, we are not free to transactionally distinguish wrongful termination claims from those claims arising out of the employment but before and unrelated to the discharge." *Yapp*, 186 F.3d at 1228.

Wilkes' reliance on *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir. 1993), is misplaced. In *Herrmann*, the plaintiff filed suit against her former employer under the continuation of benefits provision of ERISA, 29 U.S.C. §§ 1161-1168, and later filed a second suit against her former employer under Title VII. On appeal, the Seventh Circuit concluded that under the transactional test, "two claims are one . . . if they are based on the same, or nearly the same, factual allegations." *Id.* at 226. In applying that standard, the *Herrmann* court held that because the plaintiff's claims were based on different factual allegations, and had little or not factual overlap, the two claims were not so related for purposes of claim preclusion as to bar the plaintiff from bringing her Title VII claim in a second suit. Although the standard set forth in *Herrmann* would require more

similarity in the specific factual basis underlying each claim before claim preclusion would apply, this court has adopted a broader definition of "transaction." This panel is bound by our prior precedent establishing that in this factual context, the transaction is considered the employment relationship. *See Burlington Northern & Santa Fe Rwy. Co. v. Burton*, 270 F.3d 942, 944 (10th Cir. 2001) (holding "we are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court").

Wilkes maintains that claim preclusion should not bar her second suit because she was statutorily prohibited from bringing her Title VII claim until she received her right-to-sue letter from the EEOC. A number of circuit courts have rejected this position. *See, e.g., Havercombe v. Dep't of Educ.*, 250 F.3d 1, 8-9 (1st Cir. 2001); *Churchill v. Star Enters.*, 183 F.3d 184, 193-94 (3d Cir. 1999); *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032-33 (6th Cir. 1998); *Herrmann*, 999 F.2d at 225-26; *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714-15 (9th Cir. 2001); *Jang v. United Tech. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000).

In *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2d Cir. 1992), the plaintiff filed charges against her former employer with the EEOC on July 31, 1985, alleging that her employment was terminated because of her race and/or sex. In December 1985, while the administrative proceedings were still pending, Woods filed suit against her former employer under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. The district court granted summary judgment in favor of Woods' former employer on the LMRA claim. In November 1990, the EEOC issued Woods a right-to-sue letter and Woods

filed a second suit, alleging violations of Title VII. On appeal, the Second Circuit held that Woods' Title VII action was barred by the doctrine of claim preclusion. The court determined that Woods could have filed her first suit and sought a stay in the district court pending the outcome of her EEOC review. Upon completion of the administrative review, she could have amended her complaint to add her Title VII claim. Alternatively, the court found that Woods could have sought a right-to-sue notice on her Title VII claim 180 days after she filed it with the EEOC. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 (1977) ("An aggrieved person unwilling to await the conclusion of extended EEOC proceedings may institute a private lawsuit 180 days after a charge has been filed.") Woods then could have amended her complaint and added her Title VII claim. The court concluded that "[u]nder the circumstances revealed, we find no reason to excuse Woods' failure to take these minimal steps necessary to preserve each claim independently, and conclude that her Title VII claim is not exempt from the bar of res judicata." *Woods*, 972 F.2d at 41.[2]

We are persuaded by the reasoning in *Woods* and other circuits that have addressed this issue. We hold that Wilkes' Title VII claim is barred by the doctrine of claim

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[2] In *Devlin v. Transp. Communications Int'l Union*, 175 F.3d 121, 128-30 (2d Cir. 1999), the court distinguished its holding in *Woods* based on the fact that the plaintiffs brought their second suit in *Devlin* only eleven months after bringing the first suit. In addition, when the plaintiffs filed their second suit, it was referred to the same federal district judge, who accepted it as related to plaintiffs' first suit. Even if we were to conclude those factual distinctions require a different result, not all of those distinctions are present here.

preclusion. *See Herrmann*, 999 F.2d at 225 ("Title VII actions enjoy no immunity from res judicata."). Wilkes filed her charge of discrimination on March 21, 2000. The 180-day investigation period expired on September 17, 2000. Wilkes accepted the offer of settlement on October 16, 2000. Wilkes could have requested a right-to-sue notice after September 17, 2000, and amended her complaint to add her Title VII claim. Alternatively, Wilkes could have filed her equal pay claim against the Wyoming DOE and then sought a stay in the district court until completion of the EEOC administrative process. After receiving her right-to-sue letter, Wilkes could have added her Title VII claim to her initial lawsuit by amending her complaint pursuant to Federal Rule of Civil Procedure 15.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

LORNA WILKES, Plaintiff, vs. STATE OF WYOMING, WYOMING DEPARTMENT OF EMPLOYMENT, FAIR LABOR STANDARDS DIVISION, Defendant.	)	Case No. 01-CV-1020-D

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

This matter comes before the Court on Defendant's Motion for Judgment on the Pleadings. The Court, having considered the briefs and materials submitted in support of motion and Plaintiffs opposition thereto, having heard oral argument of counsel and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

BACKGROUND

Plaintiff Wilkes worked for the Department of Employment, Fair Labor Standards Division as a compliance officer from 1990 until March 2000 when she allegedly was constructively discharged. In April of 2000, Plaintiff filed a lawsuit against the Department of Employment and Charles Rando, Director of the Labor Division, individually. In that first lawsuit, Plaintiff alleged a violation of the equal pay provisions of the Fair Labor Standards Act, and a 42 U.S.C. § 1983 claim alleging retaliation in

violation of her free speech rights and deprivation of her property and liberty interest without due process of law. The unequal pay claim was based on her allegations that two other male employees who had the same position as she were paid a greater wage while doing equal work on jobs requiring equal skill, effort and responsibility. Her § 1983 claim arose out of the hiring of a new lead compliance officer in 1999. The position was given to a newly hired probationary employee which, Plaintiff alleged, was romantically involved with Plaintiffs immediate supervisor. Plaintiff alleged that when she expressed concerns about the new hire and the method by which she was selected, Rando ignored her grievance and her immediate supervisor retaliated against her by, *inter alia*, following her from job site to job site, making derisive and untrue remarks about and to Plaintiff, and inaccurately completing her performance appraisal and placing her on a "workplan."

The defendants in the first lawsuit made an offer of judgment pursuant to F.R.C.P. 68. Plaintiff accepted the Rule 68 offer, and judgment was entered against the defendants on October 31, 2000. A Satisfaction of Judgment was filed by Plaintiff on November 9, 2000.

On March 31, 2000, Plaintiff filed a Charge of Discrimination alleging Title VII violations against the Defendant with the Equal Employment Opportunity Commission and was eventually issued a Right to Sue Letter on February 8, 2001. *Id.* 25-26.

In April, 2001, Plaintiff Wilkes filed the present lawsuit against the Department of Employment only. In this second lawsuit, Plaintiff has sued the Division for alleged violations of Title VII of the Civil Rights Act of

1964 and the Wyoming Fair Employment Practices Act. These claims also arise from Plaintiff's employment with the Division and alleged constructive discharge. In this lawsuit, Plaintiff alleges, *inter alia*, the following:

> Defendant employed the Plaintiff until March 1, 2000, when, due to retaliations in violation of Federal Law, the Plaintiff was forced to leave her employment. (Am. Compl. 4.)
>
> While working at the Division, Plaintiff was harassed and discriminated against due to gender, harassed after complaining, and was subject to retaliatory efforts by the Defendant's action through its managerial employees. *Id.* 6.
>
> In April, 1999, while the Plaintiff was working for the Defendant there was a vacancy for the position of Lead Compliance Officer and for which the Plaintiff applied. *Id.* 13.
>
> [I]n the summer of 1999, the position of Lead Compliance Officer was not awarded to the Plaintiff, but was given to a "probationary employee." *Id.* 14.
>
> The "probationary employee" was having, or had engaged in, intimate relationships with the Program Manager, one of the interviewers interviewing candidates for the position of Lead Compliance Officer. *Id.* 15.
>
> The Plaintiff was qualified for the job. *Id.* 16.
>
> The Plaintiff advised the Defendant of the sexual discrimination and harassment, but the Defendant failed to correct the discriminatory action. *Id.* 17.

> Instead of correcting the wrongful conduct, the Defendant, through its supervisory personnel, retaliated against the Plaintiff in violation of 42 U.S.C. § 2000, *et seq. Id.* 18.
>
> As a result of Plaintiffs complaint about sexual harassment and discrimination, the Defendant's officers and supervisors began unfairly scrutinizing and criticizing her work performance. *Id.* at 20.

STANDARD OF REVIEW

A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is reviewed under the same standard applicable to a 12(b)(6) motion to dismiss. *Ramirez v. Dept. Of Corrections,* 222 F.3d 1238, 1240 (10th Cir. 2000). However, if the Court considers matters outside the pleadings, the motion shall be treated as a motion for summary judgment. FED. R. Civ. P. 12(c). Because the Court has considered not only the pleadings in this case, but also pleadings filed in Plaintiffs first lawsuit against Defendant as well as Plaintiffs Governmental Claim filed with the State of Wyoming, the Court will treat Defendant's motion as one for summary judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms v. Oklahoma ex rel. Dept of Mental Health &*

Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999).

DISCUSSION

Defendant argues that the entry of the Rule 68 judgment in Plaintiffs first lawsuit satisfies all of the requirements for the application of claim preclusion barring Plaintiff Wilkes' claims against the Division in the present action. Res judicata, or claim preclusion, precludes a party from relitigating issues that were or could have been raised in an earlier action. *King v. Union Oil Co. of California*, 117 F.3d 443, 445 (10th Cir. 1997). Claim preclusion "is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993). A claim will be barred by the doctrine of claim preclusion if three elements exist: (1) a judgment on the merits in the earlier action; (2) identity of the parties in both suits; and (3) identity of the cause of action in both suits. *King*, 117 F.3d at 445.

A Rule 68 judgment is a specific type of consent judgment. A consent judgment has the same effect as a trial court's final judgment on the merits for purposes of claim preclusion. *Epic Metals Corp. v. H.H. Robertson Co.*, 870 F.2d 1574, 1576 (Fed. Cir. 1989); *see also Laing v. Johnson*, 31 F.3d 1050, 1051 (10th Cir. 1994) (citing *Kaspar Wire Works, Inc. v. Leco Engineering & Mach., Inc.*, 575 F.2d 530, 538-39 (5th Cir. 1978) (observing that a judgment by consent is still an adjudication)). "Absent indications to the contrary by the parties, a consent judgment will be given full res judicata effect as to the

subject matter of the action." *American Colloid Co. v. Hodel*, 701 F.Supp. 1537, 1541 (D.Wyo. 1988). While a consent judgment is accorded the weight of a final judgment, it is contractual in nature requiring the Court to look at the consent decree itself to determine if it represents a final judgment on the merits. *Satsky*, 7 F.3d at 1468.

In Plaintiff's first lawsuit against Defendant, the Rule 68 Offer of Judgment, Acceptance of Offer of Judgment, and the Judgment are all silent as to any intent of the parties to alter the preclusive effect of the judgment or to reserve other possible claims against the defendants. Consequently, the judgment in the first lawsuit is a final judgment on the merits. Also, the parties in this action were also parties in the first action. Therefore, the first two elements for applying claim preclusion are satisfied.

The Tenth Circuit has adopted the transactional approach of the Restatement (Second) of Judgments to determine what constitutes a "cause of action" for claim preclusion purposes. *King*, 117 F.3d at 445. Under this approach, a final judgment "extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Id.* (internal quotations and citations omitted). In determining what constitutes a "transaction" or "series," the Court should consider pragmatically whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit. *Id.* A "cause of action" includes "all claims or legal theories of recovery that arise from the same transaction, event or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." *Nwosun v.*

General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10th Cir. 1997).

A review of the facts alleged in the Plaintiffs respective complaints reveals that the claims in the present action arise from the same transaction, or series of connected transactions, as the claims in the first lawsuit. In *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir. 1992), an employee sued her former employer to recover unpaid overtime compensation under the Fair Labor Standards Act. *Id.* at 1236. After an order dismissing the action with prejudice, precipitated by a stipulated motion to dismiss, the employee filed a second lawsuit against her employer alleging discrimination because of her age in violation of the Age Discrimination in Employment Act, and deprivation of equal pay in violation of the Equal Pay Act. *Id.* The Court of Appeals rejected the district court's restrictive interpretation of the Restatement's transaction test stating:

> Notwithstanding the district court's finding to the contrary, we must hold that the two actions were "related in time, space, origin, or motivation." Furthermore, the "claims" asserted in the two cases formed "a convenient trial unit," particularly in that the various "claims" and legal theories were predicated exclusively on [the plaintiffs] employment relationship with [her employer].

Id. at 1239 (citations omitted).

Similarly, the Court concludes that Plaintiffs various claims are so related in "time, space, origin or motivation" and form a "convenient trial unit" as to require that the claims be brought in one lawsuit. *See King*, 177 F.3d at 448.

Plaintiff argues that she did not allege Title VII violations in her first lawsuit because she was statutorily prohibited from raising them. Plaintiff timely field a charge with the Equal Employment Opportunity Commission ("EEOC") and the Right to Sue Letter was issued by the 'United States Department of Justice on February 8, 2001. Federal law prohibits the filing of a Title VII action until after the right to sue letter is issued. Therefore, Plaintiff contends, claim preclusion does not apply because she could not have brought her Title VII claims in the previous action.

The fact that Plaintiff had not yet received a right to sue letter does not preclude the application of claim preclusion in this case. The Second Circuit Court of Appeals addressed this issue in *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2nd Cir. 1992). In *Woods*, plaintiff filed charges against her employer with the EEOC on July 31, 1985, alleging that her employment was terminated because of her race and/or sex. *Id.* at 37. In December of 1985, while the administrative proceedings were still pending, plaintiff Woods filed a lawsuit against her employer and union alleging violations of the Labor Management Relations Act ("LMRA"). *Id.* That action was commenced shortly before the six-month statute of limitations period for LMRA claims was to expire. *Id.* The district court granted summary judgment in favor of the employer and the union and dismissed Woods' complaint. *Id.*

Two years later, the EEOC concluded its administrative process and issued a Notice of Right to Sue letter. Woods then filed a second action in federal district court against her employer only alleging a Title VII violation by wrongfully discharging her on the basis of her race and

gender. *Id.* at 38. The employer then moved for summary judgment on the basis of res judicata asserting that Woods could have raised the race and sex discrimination claims in her first action. *Id.* On appeal from the district court's grant of summary judgment, Woods argued that the doctrine of res judicata was inapplicable because the two actions were distinct and because the administrative review of her Title VII claim could not be completed in time to join it with her LMRA claim. *Id.*

While recognizing that Title VII requires an employee to first submit her claim to the EEOC, the Woods court noted that . . . [i]f a complainant is dissatisfied with the progress the EEOC is making on his other charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court' after 180 days." *Id.* at 39 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977)). "[T]he fact that Congress preferred that Title VII disputes be resolved in the administrative forum does not necessarily excuse compliance with general rules governing federal litigation respecting other potentially viable claims." *Id.* at 39-40. The *Woods* court went on to conclude that Woods had two available alternatives she could have followed to avoid the sting of res Judicata. *Id.* at 41. First, she could have filed her LMRA claim and then sought a stay pending the outcome of the Title VII administrative proceedings, amending her complaint to add her Title VII claim once the administrative review was completed. *Id.* As a second alternative, Woods could have filed the LMRA action, sought a right to sue notice on her Title VII claim from the EEOC after 180 days, and then amended her complaint to include the Title VII claim. *Id.* Accordingly, the Second Circuit Court of

Appeals concluded that Woods' second lawsuit was barred by the doctrine of res judicata. *Id.*

More recently, the Ninth Circuit Court of Appeals also addressed this issue stating,

> [W]e now join our sister circuits in holding that Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their title VII claims.

Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 714-15 (9th Cir. 2001) (citing *Heyliger v. State Univ. & Cinty. College Sys. of Tenn.*, 126 F.3d 849, 856 (6th Cir. 1997); *Herrmann v. Cencom Cable Assoc., Inc.*, 999 F.2d 223, 225-26 (7th Cir. 1993); *Woods,* 972 F.2d at 40-41; *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000); *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000); and *Churchill v. Star Enters.*, 183 F.3d 184, 193-94 (3rd Cir. 1999)).

Plaintiff could have exercised either of the options described in the above cases, but did not.

Accordingly, the Court concludes that the present action is barred by the doctrine of res judicata.[1] THEREFORE, it is hereby

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[1] Because the Court finds that Plaintiffs action is barred by res judicata, it is unnecessary to address Defendant's alternative argument under the Eleventh Amendment.

ORDERED that the Defendant's Motion for Judgment on the Pleadings is GRANTED and this action is DISMISSED with prejudice.

DATED this 11th day of December, 2001.

/s/ William F. Downes
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LORNA WILKES

Plaintiff-Appellant,

v. No. 02-8003

WYOMING DEPARTMENT OF EMPLOYMENT DIVISION OF LABOR STANDARDS

Defendant-Appellee

UNITED STATES OF AMERICA,

Intervenor

ORDER

Filed April 14, 2003

Before **BRISCOE**, **HOLLOWAY**, and **HARTZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk